

SENATE BILL 3851

By Wilder

AN ACT to amend Tennessee Code Annotated, Title 56,
relative to guaranteed asset protection waivers.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 56, is amended by adding Sections 2 through 10 of this act as a new appropriately designated chapter.

SECTION 2.

(a) This act shall be known and may be cited as the "Guaranteed Asset Protection Waiver Act of 2008".

(b) The purpose of this act is to provide a framework within which guaranteed asset protection waivers are defined and may be offered within the state. Guaranteed asset protection waivers governed under this act are not insurance and are exempt from the insurance laws of this state. Persons marketing, soliciting, negotiating, selling or offering to sell guaranteed asset protection waivers to borrowers that comply with this act are exempt from this state's insurance licensing requirements. This act does not apply to an insurance policy offered by an insurer under the insurance laws of this state or a debt cancellation or debt suspension contract being offered in compliance in 12 CFR Part 37 or 12 CFR Part 721 or other state or federal law, including § 45-2-601.

SECTION 3. The following definitions are for purposes of this act and are not intended to provide actual terms required in guaranteed asset protection waivers:

(1) "Administrator" means a person, other than an insurer or creditor, that performs administrative or operational functions pursuant to a guaranteed asset protection waiver;

(2) "Borrower" means a debtor, retail buyer or lessee, under a finance agreement;

(3) "Creditor" means:

- (A) The lender in a loan or credit transaction;
- (B) The lessor in lease transaction;
- (C) Any motor vehicle dealer as defined in § 55-17-102(16);
- (D) The seller in commercial retail installment transactions; or
- (E) The assignees of any of the foregoing to whom the credit obligation is payable;

(4) "Commissioner" means the commissioner of the department of commerce and insurance;

(5) "Finance agreement" means a loan, lease or retail installment sales contract for the purchase of a motor vehicle;

(6) "Free look period" means the period of time from the effective date of the GAP waiver until the date the borrower may cancel the contract without penalty, fees or costs to the borrower. This period of time shall not be shorter than thirty (30) days;

(7) "Guaranteed asset protection waiver" or "GAP waiver" means a contractual agreement wherein a creditor agrees for a separate charge to cancel or waive all or part of amounts due on a borrower's finance agreement in the event of a total physical damage loss or unrecovered theft of a motor vehicle, which agreement must be part of, or a separate addendum to, the finance agreement;

(8) "Insurer" means an insurance company licensed, registered, or otherwise authorized to do business under the laws of this state, including surplus lines insurers;

(9) "Motor vehicle" means self propelled or towed vehicles designed for personal or commercial use, including but not limited to automobiles, trucks, motorcycles, recreational vehicles, all terrain vehicles, campers, boats, personal watercraft, and motorcycle, boat, camper and personal watercraft trailers;

(10) "Person" includes an individual, company, association, organization, partnership, business trust, corporation, and every form of legal entity;

(11) "Retail buyer" means a person who buys motor vehicles as defined in this act not principally for the purpose of resale; and

(12) "Retail seller" means a person that is regularly engaged in the selling of motor vehicles as defined in this act to a retail buyer and that holds any necessary license(s) to sell to a retail buyer.

SECTION 4.

(a) GAP waivers may be offered, sold, or provided to borrowers in this state in compliance with this act.

(b) GAP waivers may, at the option of the creditor, be sold for a single payment or may be offered with a monthly or periodic payment option.

(c) Notwithstanding any other provision of law, any cost to the borrower for a guaranteed asset protection waiver entered into in compliance with the Truth in Lending Act (15 USC 1601 et seq.) and its implementing regulations, as they may be amended from time to time, shall be separately stated and is not to be considered a finance charge or interest.

(d) A retail seller shall insure its GAP waiver obligations under a contractual liability or other insurance policy issued by an insurer. A creditor, other than a retail seller, may insure its GAP waiver obligation under a contractual liability policy or other such policy issued by an insurer. Any such insurance policy may be directly obtained by a creditor, retail seller, or may be procured by an administrator to cover a creditor's or retail seller's obligations. However, retail sellers that are lessors on motor vehicles are not required to insure obligations related to GAP waivers on such leased vehicles.

(e) The GAP waiver remains a part of the finance agreement upon the assignment, sale or transfer of such finance agreement by the creditor.

(f) Neither the extension of credit, the term of credit, nor the term of the related motor vehicle sale or lease may be conditioned upon the purchase of a GAP waiver.

(g) Any creditor that offers a GAP waiver shall report the sale of, and forward funds received on all such waivers to the designated party, if any, as prescribed in any applicable administrative services agreement, contractual liability policy, other insurance policy or other specified program documents.

(h) Funds received or held by a creditor or administrator and belonging to an insurer, creditor or administrator, pursuant to the terms of a written agreement must be held by such creditor or administrator in a fiduciary capacity.

SECTION 5.

(a) Contractual liability or other insurance policies insuring GAP waivers shall state the obligations of the insurer to reimburse or pay to the creditor any sums the creditor is legally obligated to waive under the GAP waivers issued by the creditor and purchased or held by the borrower.

(b) Coverage under a contractual liability or other insurance policy insuring a GAP waiver shall also cover any subsequent assignee upon the assignment, sale or transfer of the finance agreements.

(c) Coverage under a contractual liability or other insurance policy insuring a GAP waiver shall also remain in effect unless canceled or terminated in compliance with applicable insurance laws of this state.

(d) The cancellation or termination of a contractual liability or other insurance policy shall not reduce the insurer's responsibility for GAP waivers issued by the creditor

prior to the date of cancellation or termination and for which a premium has been received by the insurer.

SECTION 6.

Guaranteed asset protection waivers shall disclose, as applicable, in writing and in clear, understandable language that is easy to read, the following:

- (1) The name and address of the initial creditor and the borrower at the time of sale, and the identity of any administrator if different from the creditor;
- (2) The purchase price and the terms of the GAP waiver, including, without limitation, the requirements for protection, conditions, or exclusions associated with the GAP waiver;
- (3) That the borrower may cancel the GAP waiver with a free look period, as specified in the waiver, and will be entitled to a full refund of the purchase price, provided no claim for benefits has been made or no benefits have been paid; or in the event a claim has been made or benefits have been paid, the borrower may receive a full or partial refund if the waiver so provides;
- (4) The procedure the borrower shall follow, if any, to obtain GAP waiver benefits under the terms and conditions of the waiver, including a telephone number and address where the borrower may apply for waiver benefits;
- (5) Whether or not the GAP waiver is cancelable after the free look period and the conditions under which it may be cancelled or terminated including the procedures for requesting any refund due;
- (6) That in order to receive any refund due in the event of a borrower's cancellation of the GAP waiver agreement or early termination of the finance agreement after the free look period of the GAP waiver, the borrower, in accordance with terms of the waiver, must provide a written request to cancel to

the creditor, administrator or such other party, within ninety (90) days after the borrower's decision to cancel the waiver or the occurrence of the event terminating the finance agreement;

(7) The methodology for calculating any refund of the unearned purchase price of the GAP waiver due, in the event of cancellation of the GAP waiver or early termination of the finance agreement; and

(8) That neither the extension of credit, the terms of the credit, nor the terms of the related motor vehicle sale or lease, may be conditioned upon the purchase of the GAP waiver.

SECTION 7.

(a) Guaranteed asset protection waiver agreements may be cancelable or non-cancelable after the free look period. GAP waivers must provide that if a borrower cancels a waiver within the free look period, the borrower will be entitled to a full refund of the purchase price, provided no claims have been made or no benefits have been paid; or in the event benefits have been paid or claims made, the borrower may receive a full or partial refund if the waiver so provides.

(b) In the event of a borrower's cancellation of the GAP waiver or early termination of the finance agreement, after the agreement has been in effect beyond the free look period, the borrower may be entitled to a refund of any unearned portion of the purchase price of the waiver unless the waiver provides otherwise. In order to receive a refund, the borrower, in accordance with any applicable terms of the waiver, shall provide a written request to the creditor, administrator or other party, within ninety (90) days after the borrower's decision to cancel the waiver or the occurrence of the event terminating the finance agreement.

(c) If the cancellation of a GAP waiver occurs as a result of a default under the finance agreement or the repossession of the motor vehicle associated with the finance agreement, or any other termination of the finance agreement, any refund due may be paid directly to the creditor or administrator and applied as set forth in paragraph (d) in this section.

(d) Any cancellation refund under subsections (a) through (c) above, may be applied by the creditor as a reduction of the amount owed under the finance agreement, unless the borrower can show that the finance agreement has been paid in full.

SECTION 8.

Sections 4(c), 6 and 9 of this act are not applicable to a guaranteed asset protection waiver offered in connection with a lease or sale associated with a commercial transaction.

SECTION 9.

(a) The commissioner may take action which is necessary or appropriate to enforce the provisions of this act and to protect guaranteed asset protection waiver holders in this state. After proper notice and opportunity for hearing the commissioner may:

(1) Order the creditor, administrator or any other person not in compliance with this section to cease and desist from further guaranteed asset protection waiver related operations which are in violation of this act; and

(2) Impose a penalty of not more than five hundred dollars (\$500) per violation and no more than ten thousand dollars (\$10,000) in the aggregate for all violations of similar nature. For purposes of this section, violations must be of a similar nature if the violation consists of the same or similar course of conduct,

action or practice, irrespective of the number of times the section, conduct or practice which is determined to be a violation of this act occurred.

SECTION 10. The general assembly finds that guaranteed asset protection waivers are not insurance. All guaranteed asset protection waivers issued prior to and after the date of enactment of this act shall not be construed as insurance.

SECTION 11. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 12. This act shall take effect upon becoming a law, the public welfare requiring it.